

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7095

To Be Argued By
James W. Lamberton

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7095

TRIEBWASSER & KATZ, a partnership consisting of
JONAH TRIEBWASSER and WILLIAM KATZ,

Plaintiff-Appellee,

-against-

AMERICAN TELEPHONE & TELEGRAPH COMPANY, NEW YORK
TELEPHONE COMPANY and REUBEN H. DONNELLEY CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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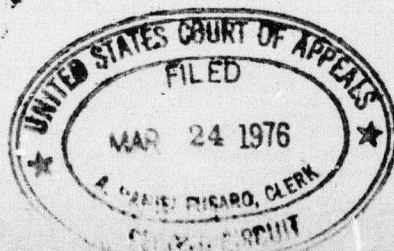


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UNITED STATES COURT OF APPEALS
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consisting of JONAH TRIEBWASSER
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Plaintiff-Appellee,

-against-

AMERICAN TELEPHONE & TELEGRAPH
COMPANY, NEW YORK TELEPHONE COMPANY
and REUBEN H. DONNELLEY CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

This is an appeal, pursuant to 28 U.S.C. § 1292(a)(1), from the order of the district court, Cannella, J., entered on February 25, 1976 and modified on February 26, 1976, granting plaintiff's motion for a preliminary injunction against defendants. The district court's opinion, dated February 26, 1976, is unreported but is printed in the Appendix at 298A-312A.*

* Page citations followed by "A" are citations to the Appendix filed with this Court on this appeal.

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in issuing a preliminary injunction in an antitrust case, altering the status quo and providing plaintiff with the ultimate relief it sought, by applying customary equitable standards used to maintain the status quo?

2. Did the court below err in holding, based upon the evidence before it, that plaintiff made a clear showing that there were serious questions going to the merits under the antitrust laws regarding (a) whether a conspiracy existed between AT&T and its wholly owned subsidiary, N.Y. Telco, (b) whether N.Y. Telco's standard preventing the advertising of the detection and removal of electronic surveillance devices unreasonably restrained trade in violation of the antitrust laws and (c) whether the application of that standard to prevent a New York private investigative agency from advertising "debugging" services in the classified telephone directory for Queens County, New York was a restraint of trade "among the several states" in violation of Section 1 of the Sherman Act?

3. Did the court below err in its holding that the plaintiff had made a sufficient showing that the harm it might sustain, although clearly compensable by money damages, warranted the issuance of a preliminary injunction that would give plaintiff a competitive advantage over

all others similarly situated?

STATEMENT OF THE CASE

This litigation arises out of the claim of plaintiff-appellee Triebwasser and Katz, a private investigative agency, that the defendant New York Telephone Company's policy of refusing to publish advertisements in the classified telephone directory relating to "debugging" services constitutes a violation of federal and state antitrust laws, federal civil rights law and state penal law. The defendants-appellants are American Telephone and Telegraph Company ("AT&T"), the New York Telephone Company ("N.Y. Telco") and The Reuben H. Donnelley Corporation ("Donnelley").

On February 17, 1976, plaintiff filed its complaint seeking both injunctive relief and damages of \$1 million against N.Y. Telco, the publisher of classified telephone directories ("Yellow Pages") for the New York metropolitan area, AT&T (N.Y. Telco's parent corporation) and Donnelley, an advertising sales representative for the Yellow Pages. On the same day, proceeding by order to show cause, the plaintiff moved for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. The order to show cause contained a temporary restraining order enjoining the defendants "from in any way proceeding with or effecting the publishing of any

and all of the Yellow Pages for the metropolitan New York area" pending the hearing of plaintiff's motion. (26A).*

Pursuant to the order to show cause, a hearing was held six days later, on February 23, 1976. It lasted approximately one-half day, with one of the partners in the plaintiff investigative agency being the only witness called to testify. On February 25, 1976, the district court issued an order granting the plaintiff's motion for a preliminary injunction and enjoined the defendants from refusing to publish the plaintiff's proposed advertisement for debugging services in the Queens County Yellow Pages. (295A-296A). In substance, this ruling altered the status quo and granted the plaintiff the full injunctive relief it was seeking on the merits.

On February 26, 1976, the district court filed an opinion setting forth the reasons for its decision. Although noting the "somewhat barren factual record produced by the plaintiffs" (307A), the district court found that, while N.Y. Telco's policy regarding the advertising of debugging services was designed "to protect the public from bugging" (308A), the plaintiff had raised serious questions going to the merits regarding the existence of an intercorporate conspiracy between

* The Yellow Pages for Bronx County, for which plaintiff had made no application, were scheduled to be published on or about March 1, 1976. This temporary restraining order would have prevented their publication.

AT&T, N.Y. Telco and other companies in the Bell System which unreasonably "restrains and suppresses the debugging business" in violation of Section 1 of the Sherman Act and that the balance of hardships tipped decidedly in favor of the plaintiff. (301A, 310A).

Defendants filed a Notice of Appeal on March 5, 1976. (314A). At the same time, defendants moved, pursuant to Second Circuit Rule 27(e), for an expedited appeal so that review might be had of the lower court's decision prior to May 1, 1976, the date on which the defendants would be required to include the plaintiff's advertisement in the Queens County Yellow Pages and thereby provide plaintiff with an unfair competitive advantage over all other similarly situated advertisers to whom the advertising standards of N.Y. Telco have been consistently applied. The motion for an expedited appeal schedule was granted by this Court, Gurfein, J., on March 12, 1976. (315A).

STATEMENT OF FACTS

AT&T is the parent corporation of N.Y. Telco and does not publish telephone directories for circulation to the public. (82A, 129A). AT&T is also the parent corporation of 22 other operating telephone companies which, with N.Y. Telco, constitute a part of the Bell System. (129A).

N.Y. Telco, a wholly-owned subsidiary of AT&T, provides telephone services as a public utility in the State of New York and its intrastate activities are regulated by the Public Service Commission of the State of New York. N.Y. Telco publishes and furnishes to its subscribers two kinds of telephone directories, the alphabetical or White Pages telephone directories and the classified or Yellow Pages directories. The White Pages are part of the telephone services that N.Y. Telco provides to its subscribers and are under the supervision of the Public Service Commission. Yellow Pages directory advertising is not regulated by the New York State Public Service Commission. In the Yellow Pages, N.Y. Telco furnishes, without charge, a listing under the appropriate heading for its business subscribers; and in addition each business subscriber who elects to do so may purchase advertising in the Yellow Pages. The revenues from Yellow Pages advertising are reported to the Public Service Commission and serve to offset the overall costs of providing telephone services to N.Y. Telco subscribers in the State of New York. (68A-73A).

Plaintiff is a private investigative agency and received its license to engage in this business in New York on January 14, 1976. (7A-8A). In going into this

business, plaintiff estimated that its first year's revenues would approximate \$50,000, based upon the experience of other companies that it studied. It estimated that 60% of its revenue, or \$30,000, would be derived from "counter measures", i.e., the debugging business. (281A).

In early February, 1976, plaintiff submitted to Donnelley, N.Y. Telco's sales representative for the Yellow Pages in the New York City metropolitan area, a proposed advertisement which stated in part: "We can detect and remove unwanted and illegal electronic listening devices from your telephone, home or office." Applying N.Y. Telco's standards for such advertisements in the Yellow Pages, Donnelley rejected the proposed advertisement. (62A).

In conjunction with Donnelley, plaintiff then prepared an advertisement for its private investigative services which was in compliance with N.Y. Telco standards and this revised advertisement was accepted by N.Y. Telco. Plaintiff, not satisfied with the advertisement as revised, then consulted counsel and brought this lawsuit. (257A-260A, 263A).

The N.Y. Telco standard to which plaintiff objects is as follows:

"Advertising, whether by text or illustration, may not state or imply that wiretapping or eavesdropping is performed by the advertiser or that he has available equipment or devices for such purposes. This policy has always been interpreted as prohibiting not only advertising of wiretapping and eavesdropping devices and services but also so-called debugging advertising (i.e., advertising stating or implying devices or services will be provided for the detection and removal of wiretaps and eavesdropping "bugs") since those who can debug also generally possess, or the public believes they possess, the capability to bug and wiretap." (21A).

This policy, it should be emphasized, does not foreclose plaintiff or any other private investigative agency from advertising in the Yellow Pages; rather, it merely prohibits any advertisers from advertising that they provide debugging services. N.Y. Telco remains willing to accept any advertisement submitted by plaintiff for inclusion in the Yellow Pages so long as it conforms with N.Y. Telco's heretofore adopted standards and guidelines. (259A).

There are other classified telephone directories in Queens County not published by N.Y. Telco as well as newspaper and broadcasting available to plaintiff to advertise its services. (78A-80A). Plaintiff asserted, however, that it would be required to spend \$2,400,000 (200 times the cost of its proposed advertising budget) to reach the same market as the Queens County Yellow Pages. (111A). That amount, for which no breakdown was provided,

is approximately 80% of the \$3,055,000 that it costs N.Y. Telco to publish the 1,028,000 copies of the Queens Yellow Pages, a volume of 1,164 pages, which it distributes. (71A).

N.Y. Telco's policy respecting the advertising of debugging services is of long standing; it is applied on a uniform and non-discriminatory basis as part of a private publisher's efforts to exercise some control over the contents of the advertisements which appear in its publication. Thus, the order form on which advertising copy is submitted to N.Y. Telco for inclusion in the Yellow Pages expressly provides that N.Y. Telco "reserves the right . . . to alter any representation to make it conform with the standards and practices governing the printing of telephone directories published by the Company." (75A-78A).

N.Y. Telco's policy respecting the advertising of debugging services grew out of N.Y. Telco's concern to protect the public from electronic surveillance and is a part of the standards and guidelines it has adopted banning the advertising of wiretapping and eavesdropping services, activities which are illegal under both federal and state law. (76A-78A, 140A). It was adopted after the publication by AT&T of suggested standards and after review with AT&T and other Bell System companies. (129A). While

AT&T's recommendations are persuasive, they are not binding on N.Y. Telco and N.Y. Telco adopts its own standards. (82A).

These standards and guidelines originated over 30 years ago when N.Y. Telco, as well as other companies in the Bell System, adopted the policy of refusing to accept in the Yellow Pages advertisements by private investigative agencies or others stating or implying that the services being offered included the use of wiretapping. These standards were expanded to prohibit the acceptance of eavesdropping advertisements in the mid-1960's during the consideration of the Omnibus Crime Control Act by Congress, prior to the date that advertising of eavesdropping devices was made a criminal offense. (125A-126A, 140A). Debugging advertisements were included in the ban because N.Y. Telco believed that those who possess the capacity to "debug" also have the capability to "bug" and that the advertising of "debugging" services would become a code word for persons who were seeking to retain someone to engage in illegal bugging and eavesdropping activities. (76A-77A, 126A, 140A).

That this is a reasonable belief is supported by the sworn statements of Messrs. Triebwasser and Katz that make it clear that each possesses the capability to install illegal electronic listening devices. Mr. Triebwasser, in his affidavit submitted in support of plaintiff's motion for a preliminary injunction, states (29A):

"Through education, and my prior experience with certain of the agencies of the criminal justice system of the State of New York, I have obtained training and education in the field of electronic surveillance." [Emphasis supplied].

Similarly, Mr. Katz, in the hearing before Judge Cannella, testified as follows (270A-271A):

"THE WITNESS: A simple wiretap, if that is what you are talking about, yes, obviously, I think I could accomplish that

Q. Just for example, sir, would you know how to place a listening device in a room such as the one we are now in?

A. I would say I probably could, yes."

N.Y. Telco is not in the debugging business; its business is the rendition of telephone services and the provision of telephone equipment to its subscribers. It encourages the use of the telephone as a means of communication by numerous advertisements but it does not advertise or solicit customers for telephone debugging services in the Yellow Pages or otherwise. N.Y. Telco, as part of its telephone services, provides repair service for telephone equipment which it owns and which it utilizes to provide service to the public. Whenever a telephone subscriber reports to N.Y. Telco that there is a problem with the subscriber's telephone which inhibits or prevents the intended use of the telephone, N.Y. Telco will dispatch personnel to make whatever repairs are required

in order to render the telephone usable. In those instances where N.Y. Telco finds a listening or recording device on a telephone line, it promptly notifies the district attorney in the county where the device is discovered. It then awaits the instructions of the public authorities. (95A-99A).

Thus, any "de-wiretapping" services provided by N.Y. Telco are part of the repair services rendered by N.Y. Telco to its subscribers. These services are treated as a cost of doing business as is any other repair service and the subscriber is not charged for it. (95A-97A). While plaintiff seeks to advertise an ability to remove listening devices "from your telephone, home or office", N.Y. Telco's work relates solely to telephone equipment and it does not provide, as a repair service or otherwise, any services for the detection or removal of non-telephone related listening devices from homes or offices. (97A).

Plaintiff alleged that N.Y. Telco's policy respecting debugging advertisements is part of a conspiracy by the defendants to control the so-called debugging industry for themselves (11A-12A), but Judge Cannella found no evidence in the record to support such a charge. (308A). Indeed, it is a misnomer to speak of the debugging industry. To put this activity in perspective, there were approximately 144,000,000 telephones in the United States during

1974. The companies making up the Bell System have approximately 90,000 employees with daily work assignments outside their offices. The functions of these employees, primarily telephone installers and repairmen, are to install phones and to maintain telephone company equipment. (140A-141A).

During the course of a year, the 23 operating companies of the Bell System receive approximately 10,000 complaints from customers who believe that their lines are tapped, based primarily upon unusual noises on the line. Ninety percent of these complaints are handled through central office electronic testing which establishes that these noises arise from plant difficulties and can be repaired without checking a customer's lines. Approximately 10% of these complaints, or 1,000 per year for the 23 operating companies, require actual checking of the customer's line. (125A, 141A). Over the 7-1/2 year period January 1967-June 1974, 26 wiretapping and eavesdropping devices were found by N.Y. Telco personnel on telephone facilities, equipment and instruments in the State of New York. (115A, 149A).

While the nationwide statistics quoted by plaintiff (115A) seem large, they are not when viewed in the light of the number of telephone companies and telephones involved. The record in this case shows the checking of an average of 44 lines per year for each operating telephone company in the Bell

System -- hardly a substantial activity.*

ARGUMENT

N.Y. Telco's policy respecting debugging advertisements resulted from a bona fide concern to protect the public from electronic surveillance. As the policy's history makes clear, there is not the slightest indication of any anti-competitive purpose in its evolution. Essentially, it is part of the effort by a private publisher to maintain standards governing the contents of the advertisements which appear in its publication.

Nevertheless, the court below, on the basis of a record which it generously characterized as "somewhat barren" (307A), found that the plaintiff had raised serious questions going to the merits regarding the existence of an intercorporate conspiracy between AT&T, N.Y. Telco and other companies in the Bell System which unreasonably "restrains and suppresses the debugging business" (310A) in violation of Section 1 of the Sherman Act and that the balance of hardships tipped decidedly in favor of the plaintiff. On the basis of this finding, the court below, notwithstanding the fact that any harm that plaintiff might sustain is clearly compensable by money damages, issued a preliminary injunction which could require N.Y. Telco to include plaintiff's debugging advertisement in the Queens Yellow Pages -- i.e.,

* By the same token, debugging is only one facet of the plaintiff's private investigative business. N.Y. Gen. Bus. Law § 71(1).

an injunction which has the effect of altering the status quo and providing the plaintiff with the full relief it was seeking on the merits, and which has the further effect of giving the plaintiff a competitive advantage over all others similarly situated to whom the N.Y. Telco policy respecting debugging advertisements has been consistently applied. In granting the plaintiff this extraordinary relief, we submit, the court below committed reversible error.

This Court may reverse the decision of the district court if it finds either an abuse of discretion or a clear mistake of law. 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1974). But see Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222, 231 (2d Cir. 1962), vacated on other grounds sub nom. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) ("The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was 'clearly' so") Unlike many cases, the traditional deference of the appellate court to the trial court's ability to judge the credibility of witnesses has little weight here, since the plaintiff relied primarily on affidavits and produced only one witness for a short examination. See generally Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972); Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1197 (2d Cir. 1971). It is defendants' position

that the court below, in granting plaintiff's motion for a preliminary injunction, erred in the following respects:

I. UNDER THE CIRCUMSTANCES OF THIS CASE,
THE COURT BELOW DID NOT APPLY THE PROPER
STANDARD IN DETERMINING WHETHER THE
PLAINTIFF WAS ENTITLED TO A PRELIMINARY
INJUNCTION

A preliminary injunction is a drastic and extraordinary remedy. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999 (1969). In granting plaintiff's motion, the court below applied the second standard governing the issuance of preliminary relief set forth in Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973):

"The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." (Emphasis in original).

In so doing, it erred, since the plaintiff's burden was substantially higher under the circumstances of this case. First, where a party alleging violation of federal antitrust laws seeks a preliminary injunction, the standards for granting such a remedy are those set forth in the Clayton Act:

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, . . . when and under the same conditions as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."
15 U.S.C. §26. (Emphasis added).

See SCM Corp. v. Xerox Corp., 507 F.2d 358, 360 (2d Cir. 1974) ("[Plaintiff] admittedly cannot escape its burden of establishing the threat of irreparable harm. The statute so requires and we are not free to disregard it"). Thus, in the antitrust field, the party seeking a preliminary injunction must not only satisfy the traditional equitable tests (as enunciated in Sonesta) but must also show "that the danger of irreparable loss or damage is immediate." The test for determining irreparable injury is set forth in Sampson v. Murray, 415 U.S. 61, 84-92 (1974).

Second, where the effect of the lower court's preliminary injunction is to give the plaintiff the ultimate relief it seeks -- the publication of its debugging advertisement in the Yellow Pages -- the injunction should not issue at the preliminary stage of the lawsuit. Knapp v. Walden, 367 F. Supp. 385 (S.D.N.Y. 1973). Even assuming the granting of such relief would be proper under any circumstances, plaintiff must show "a clear right to relief and that irreparable injury will result if [its] motion is

denied." Blaich v. National Football League, 212 F. Supp. 319, 320 (S.D.N.Y. 1962); Columbia Pictures Industries, Inc. v. American Broadcasting Co., Inc., 1974-1 Trade Cases ¶ 74,912 (S.D.N.Y.), aff'd, 501 F.2d 894 (2d Cir. 1974) (the burden of proof is "greater" than in the usual case); Hambros Bank, Ltd. v. Meserole, 287 F. Supp. 69, 71 (S.D.N.Y. 1968) (plaintiff must carry a "heavier" burden than in the usual case). A preliminary injunction is particularly inappropriate where, as here, its effect is to alter the status quo by requiring N.Y. Telco accept an advertisement that violates its long-standing advertising standard, rather than to preserve the rights of the parties pending a final determination on the merits. Checker Motors Corp. v. Chrysler Corp., supra.

Finally, while the injunction here was in form prohibitory, it was in substance mandatory in that it enjoined defendants "from refusing to accept plaintiff's advertisement. . . ." Courts are traditionally more reluctant to grant mandatory relief and will grant such relief only upon a far heavier showing than was made in the instant case. As the court stated in Clune v. Publishers' Association, 214 F. Supp. 520, 531 (S.D.N.Y.), aff'd per curiam, 314 F.2d 343 (2d Cir. 1963):

"[C]ourts are more reluctant to grant a mandatory injunction than a prohibitory one and . . . generally an injunction will not lie except in prohibitory

form. Such mandatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages."

See also Rosenstiel v. Rosenstiel, 278 F. Supp. 794, 801 (S.D. N.Y. 1967).

Thus, in applying the Sonesta standard to the issuance of the preliminary injunction in this case, the court below erred by failing to hold plaintiff to the more rigorous standard that governs when such relief is sought in an antitrust case, and when the court issues an injunction directing defendants to grant plaintiff the ultimate relief it seeks.

II. EVEN UNDER THE STANDARD ANNOUNCED BY THE COURT BELOW, A PRELIMINARY INJUNCTION WAS IMPROVIDENTLY GRANTED.

The court below relied on the second prong of the test set forth in Sonesta International Hotels Corp. v. Wellington Associates, supra: that plaintiff had made a clear showing that 1) there were sufficiently serious questions going to the merits to make them a fair ground for adjudication and 2) the balance of hardships tipped decidedly toward plaintiff. Although the court below did not rely on the first prong of the Sonesta test -- probable success on the merits and possible irreparable injury -- the applicable law as applied to facts of this case makes it clear that neither prong of the Sonesta test could

justify the issuance of the preliminary injunction in this case.

A. There was no "clear showing."

Sonesta requires that a plaintiff make a clear showing of its entitlement to a preliminary injunction. In making such a "clear showing," the party seeking relief carries the burden of persuasion. Robert W. Stark, Jr., Inc., v. New York Stock Exchange, Inc., 466 F.2d 743 (2d Cir. 1972). Where there are factual disputes raised in the affidavits which can only be resolved at trial, the requisite showing is not made and a preliminary injunction must be denied. 601 West 26 Corp. v. Solitron Devices, Inc., 420 F.2d 293 (2d Cir. 1969), aff'g, 291 F. Supp. 882 (S.D.N.Y. 1968); Tropic Film Corp. v. Paramount Pictures Corp., 319 F. Supp. 1247 (S.D.N.Y. 1970). As the district court noted in the Solitron case, supra at 885:

"[T]he only conclusion which this Court can draw from the confused welter of testimony offered is that there are substantial, complicated, material questions of fact and law including inferences and interpretations, which are sharply disputed. Where this situation is present, the Court must deny the application for a preliminary injunction. . . ."

Among the many sharply disputed issues in the instant case which should properly await resolution at trial are:

- 1) Whether there was an actionable contract, combination or conspiracy among the defendants;

2) Whether the alleged restraint imposed was unreasonable;

3) Whether the alleged combination was in restraint of interstate trade.

As discussed infra, from all that appears on the record in the court below,* these questions should have been answered in the negative. However, even if this were not true, the court below erred in finding that a clear showing had been made on these issues, particularly in light of the substantially uncontroverted affidavits of the defendant N.Y. Telco disputing plaintiff's allegations. See Cerutti, Inc. v. McCrory Corp., 438 F.2d 281, 284 (2d Cir. 1971).

B. Plaintiff failed to raise sufficiently serious questions going to the merits.

Even assuming that the record below was of the kind and quality to permit a finding that the requisite clear showing had been made, the court below erred in finding that plaintiff had raised sufficiently serious questions

* The court below adverted to the sparse proof introduced by the plaintiff:

"In attempting to [determine whether the alleged restraint herein is unreasonable], the Court is hampered by the somewhat barren factual record produced by plaintiffs." (307A).

"As to the precise impact of the no-debugging ads policy, plaintiffs' proof is at best scant." (309A).

going to the merits so as to justify the granting of a preliminary injunction. That test has been otherwise stated that plaintiff must raise

"questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).

An examination of the record below indicates that no such question has been raised. Stripped to its essentials, plaintiff's complaint is that defendants conspired to implement a policy which, while allowing plaintiff and others similarly situated to advertise their private investigative services, prevented plaintiff and others from advertising in the Yellow Pages that such services include debugging. Plaintiff thus essentially alleges a limited refusal to deal by AT&T and N.Y. Telco [see America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972)], and it was on this basis that the court below granted a preliminary injunction. N.Y. Telco maintains that there is no such conspiracy and that the decision to reject such advertising was made unilaterally by it. (82A).

1. There was no actionable conspiracy. Assuming arguendo that plaintiffs could establish that N.Y.

Telco's decision was not unilateral, there would nevertheless be no actionable conspiracy under section 1 of the Sherman Act. It is well established that in the context of a refusal to deal, a parent corporation cannot conspire with its subsidiary where they are not competitors. Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 fn. 1 (3rd Cir. 1972) (defendant parent and defendant subsidiary had never held themselves out as competitors); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 81-82 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) (no actionable conspiracy between parent and non-competing subsidiary); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L. Rev. 20 (1968); Report of the Attorney General's National Committee to Study the Antitrust Laws 33-35 (1955).

That rule is also established in this Circuit. In Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), aff'd per curiam, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972), the court held that a parent corporation could not conspire with its subsidiary in connection with an alleged refusal to deal by the subsidiary. Much like in the instant case, plaintiff in Beckman alleged that the parent dominated the affairs of the subsidiary. The court concluded:

"Assuming that there were some discussions between Kidde and its puppet, Fyre-Safety, which resulted in a refusal to sell to Beckman, the court cannot conclude that such discussions constitute a combination within the meaning of Section 1 of the Sherman Act or that they represent more than internal dialogue leading to a decision on the part of a single business unit to exercise its right to select or disenfranchise a particular distributor. See *Alpha Distributing Company of California v. Jack Daniel's Distillery, etc.*, 207 F. Supp. 136 (N.D. Cal. 1961), affirmed, 304 F.2d 451 (9th Cir. 1962). The district court case of *Hawaiian Oke Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Haw. 1967), heavily relied on by Beckman in support of a broad application of Kiefer-Stewart, was recently reversed by the Ninth Circuit, stating at the time that 'Surely a manufacturer and its national or regional distributor, whether a subsidiary or an independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott per se rule, in the absence of some forbidden anti-competitive or monopolistic objective.' *Joseph E. Seagram & Sons, Inc., v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 81-82 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970). The conclusion that the Kiefer-Stewart principle is inapplicable, is consistent with the virtually unanimous opinion of legal commentators that too broad an application of this principle--in the words of two such commentators--' is inconsistent with the basic approach of antitrust limitations on business conduct. It would unreasonably penalize companies that resort to the incorporated form of doing business, hampering achievement of legitimate business goals unrelated to antitrust considerations, without substantially improving the capacity of the antitrust system to deal with anti-competitive conduct. Willis & Pitofsky, *Anti-Trust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 24 (1968)." 316 F. Supp. at 1326.

See I. Haas Trucking Corp. v. New York Fruit Action Corp.,
364 F. Supp. 868, 873 (S.D.N.Y. 1973) (parent and subsidiary

regarded as single entity and incapable of conspiracy).

Applying the reasoning of the court below, if, for example, AT&T recommended to the 23 operating companies that, as a cost-saving measure, their employees travel coach rather than first class on business matters, an airline would be able to sustain a Section 1 Sherman Act claim against AT&T and those operating companies which followed the AT&T recommendation. The absurdity of such a result demonstrates the inapplicability of the intercorporate conspiracy doctrine to a situation where, as in the instant case, the parent and subsidiary corporations are not competitors and are seeking to achieve legitimate business goals unrelated to competitive considerations.

The court below relied upon Battle v. Liberty National Life Ins. Co., 493 F.2d 39, 44 (5th Cir. 1974), cert. denied, 419 U.S. 1110 (1975), for the proposition that "The fact that none of the co-conspirators compete with one another, in no way precludes a finding of conspiracy." (305A). We submit that Battle is a weak reed upon which to lean. Battle was an action brought by a group of funeral homes against defendant Liberty, a substantial issuer of burial insurance, and its wholly-owned subsidiary which contracted with its parent to furnish the merchandise and services required to be furnished by the latter's insurance policies. The subsidiary, in turn, contracted with certain

funeral homes ("authorized homes") to furnish services and merchandise to the parent's policy holders. If the policy holder used an "authorized home", he received substantially more in benefits than if he used an unauthorized home. Plaintiffs sued on the grounds, inter alia, that the defendants had combined to foreclose a substantial part of the market to unauthorized homes.

On a motion to dismiss the complaint, the court ruled that the absence of competition between the parent and subsidiary did not preclude a finding of conspiracy between them. In making this finding, the court cited only Beckman v. Walter Kidde & Co., supra, which held to the contrary, and ignored its apparently contradictory ruling in Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir.), cert. denied, 348 U.S. 821 (1954). We submit that the Battle case properly falls within the rule of United States v. Yellow Cab Co., 332 U.S. 218 (1947), also cited by the court below. In that case, in ruling on the sufficiency of a complaint which charged "that the restraint of interstate trade was not only effected by the combination of the appellees but was the prime object of the combination", the Supreme Court held that "any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed." 332 U.S. at 227 (emphasis supplied). No such abuse of the parent-subsidiary

relationship has been alleged, much less proved, in this case.

Finally, the court below cited Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) and George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974) in support of its decision with respect to the existence of intraenterprise conspiracy. The Doric simplicity of the language in Perma Life, however, may merely have been a reaffirmation of the ruling in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), that corporate subsidiaries which hold themselves out as competitors are capable of conspiring. See Handler, Through the Antitrust Looking Glass, 57 Calif. L. Rev. 182, 183-187 (1969). In any event, it has not prevented the more reasoned development of case law represented by the cases cited at pp. 23-24, above.* In the George R. Whitten, Jr. case, the First Circuit raised the intraenterprise conspiracy issue on its own motion [although it had not been considered by the district court and was not briefed by the defendants in the Court of Appeals (508 F.2d at 557)], resolved it quickly

* In a letter, dated February 22, 1971 from the Assistant Attorney General, Antitrust Division, to the Board of Governors of the Federal Reserve System, the Antitrust Division asserted that it would not apply the language of Perma Life literally but would limit its "use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities." 5 CCH Trade Reg. Repr. ¶ 51,122.

but held that the combined defendants had not violated the Sherman Act. To the extent that this decision conflicts with Beckman v. Walter Kidde & Co., we urge the court to follow the latter as the better reasoned precedent.

At the very least, the court below should not have made a finding of conspiracy between affiliated corporations before a trial on the merits. As the court concluded in Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 160 (D.D.C 1975):

Rarely have courts actually found affiliated corporations guilty of conspiring in violation of the Sherman Act, however, and then only in cases where, after a full trial, the facts established, either expressly or by necessary implication, that the corporations had acted without a legitimate business purpose and with anticompetitive intent. In some cases the courts have refused to apply the doctrine, finding it inappropriate to the factual context. The cases in the last two categories mentioned suggest what seems to this Court the proper approach to the intra-corporate conspiracy issue. In those cases the courts decided whether or not to treat the defendant companies as conspirators only after determining, on the basis of all the facts, whether the companies' actions amounted to, in purpose and effect, a conspiracy in restraint of trade. As the Supreme Court said, in first applying the doctrine in [United States v. Yellow Cab Co., 340 U.S. 211 (1951)], the Sherman Act "is aimed at substance rather than form."

See also Media Networks, Inc. v. American Tel. & Tel. Co., 5 CCH Trade Reg. Repr. ¶ (D. Minn. Jan. 27, 1976).

2. The alleged restraint was not unreasonable.

Central to the decision below was the court's finding that

plaintiff had made a sufficient showing that the alleged restraint--the no-debugging ads policy--was unreasonable. The court below recognized that such a finding was prerequisite to the granting of a preliminary injunction. The court explicitly found that there were "no facts . . . indicating that AT&T and its subsidiaries are attempting to restrain the debugging industry so that they themselves can control it." (308A). Indeed the court found that defendants' motive "was to protect the public from bugging." (Id.)

Instead, the court decided that a sufficient showing had been made that the restraint was unreasonable because it found that AT&T's and N.Y. Telco's "intent was to restrain the public, to the best of their ability, from contacting debuggers." (Id.). Having also decided that "the probable consequence of defendants' policy is that many individuals seeking private debugging services end up using New York Telephone as a result of the difficulty encountered in finding other companies capable of performing the service" (309A-310A), the court concluded that sufficient showing had been made that the alleged restraint was unreasonable.

It is respectfully submitted that such a conclusion--especially at this preliminary stage--cannot be upheld absent the kind of analysis mandated by the Supreme Court in

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918), cited by the court below:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

Even the most cursory review of the factors mentioned in Chicago Board of Trade demonstrates not only that the lower court's conclusion was unwarranted but also that the alleged restraint imposed in the instant case was a reasonable one. The plaintiff introduced no evidence below with respect to facts peculiar to the business of providing electronic debugging services or conditions in that business prior to or after the no-debugging ads policy was adopted.

In contrast, N.Y. Telco showed that its concern to protect the public from electronic surveillance led to the no-debugging ads policy. The record shows, in the affidavits submitted by N.Y. Telco and in the testimony of AT&T annexed to plaintiff's affidavit, the history of the restraint and the reasonable concerns that led to its adoption. The intent of N.Y. Telco is to try to ensure that its Yellow Pages are not used as a medium for obtaining illegal wiretapping or eavesdropping services.

That a concern as to electronic surveillance was a reasonable one is amply borne out in the legislative history of the Omnibus Crime Control and Safe Streets Act of 1968. The Senate Judiciary Committee Report No. 1097 (1968-2 U.S. Code & Admin. News 2112, 2154) described the situation as follows:

"The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage."

In recognition of that situation, Congress passed the Omnibus Crime Control Act which provided inter alia:

"Except as otherwise specifically provided in this chapter, any person who wilfully --

. . .

- (c) place in any newspaper, magazine, handbill, or other publication any advertisement of --

. . .

- (ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such devices for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisements will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than \$10,000 or imprisoned for not more than five years, or both." 18 U.S.C. §2512(1)(c)(ii).

In commenting upon this section, the Senate Report stated:

. . . "It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture, and advertising of intercepting devices. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation." 1968-2 U.S. Code & Admin. News 2156.

In a case upholding that section of the Act, the court in United States v. Bast, 495 F.2d 138 (D.C. Cir. 1974), stated:

". . . there is no anomaly in Congress's apparent attempt, in the advertising prohibition of § 2512(1)(c)(ii), to reach promotion of a device

for secret interception, even though the manufacture or possession of the device is not banned by § 2512(1)(b) as one 'primarily' useful for secret interception. It may be unusual but it is not unprecedented for Congress to prohibit the advertising of a product even though it has not prohibited the product or its use per se. An example that looms large currently is the prohibition of advertising of cigarettes on radio or television." 495 F.2d at 143.

Plaintiff ridicules defendants' belief that persons possessing the capability to detect and remove electronic surveillance devices have the capability to secrete and install such devices. Yet plaintiff's own sworn statements make it clear that both of the partners in this plaintiff possess both such capabilities. See pp. 10-11, supra.

That private investigators can and do involve themselves in electronic surveillance is not a figment of defendants' imagination. Referring to a comprehensive private study and a number of legislative studies, Mr. Justice Brennan concluded in his dissent in Lopez v. United States, 373 U.S. 427, 467 (1963) that:

"Electronic eavesdropping by means of concealed microphones and recording devices of various kinds has become as large a problem as wiretapping and is pervasively employed by private detectives, police, labor spies, employers and others for a variety of purposes some downright disreputable."

See also Hearings before Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. at 3 (1965)

(testimony of Rep. Gallagher); Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. at 288 (1967) (testimony of then Attorney General Ramsey Clark).

The reported decisions of federal and state courts are replete with evidence of private investigators' involvement in electronic surveillance.* The continuing concern of Congress is reflected in its establishment of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. Act of June 19, 1968, Pub. L. No. 90-351, § 804, 82 Stat. 197. That Commission is now directed to file its report, containing findings and recommendations, with the President and the Congress on April 30, 1976. Act of Dec. 23, 1975, Pub. L. No. 94-176, 89 Stat. 1031.

* E.g., United States v. Hunt, 505 F.2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975); United States v. Bragan, 499 F.2d 1376 (4th Cir. 1974); United States v. Reed, 489 F.2d 917 (6th Cir. 1974); United States v. Goldsmith, 483 F.2d 441 (5th Cir. 1973); United States v. Chas. Pfizer & Co., 426 F.2d 32, 37 (2d Cir. 1970) aff'd by an equally divided court, 404 U.S. 548 (1972); Tatum v. United States, 321 F.2d 219 (9th Cir. 1963); Remington v. Remington, 393 F. Supp. 898 (E.D. Pa. 1975); Kohler Co., 128 N.L.R.B. 1062 (1960), enforced in part, 300 F.2d 699 (D.C. Cir. 1962), cert. denied, 382 U.S. 836 (1965); People v. Superior Court, 70 Cal.2d 123, 449 P.2d 230, 74 Cal. Rptr. 294 (Sup. Ct. 1969); Nader v. General Motors Corp., 25 N.Y.2d 560, 225 N.E.2d 765 (1970); Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102 (Sup. Ct. 1966); cf. Firestone v. Time, Inc., 460 F.2d 712 (5th Cir. 1972), vacated and remanded on other grounds, 44 U.S.L.W. 4262 (Sup. Ct. March 2, 1976).

In analogous situations, courts have upheld regulations by persons responsible for advertising content. In America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., supra, the court awarded judgment to defendant newspapers who refused on policy grounds to accept plaintiff's advertising for "X" rated films. Like plaintiff here, plaintiff in that case attacked the policy on the grounds of violation of Sections 1 and 2 of the Sherman Act and the federal civil rights law. The court found that the restraint imposed was reasonable and hence lawful under the Sherman Act:

"In determining the 'reasonableness' of defendants' action, it is significant that they did not cease dealing with plaintiffs altogether, but only restricted the contents of their ads. It would be a harsh and far-reaching decision which held that a private newspaper was compelled by federal statute to publish advertising without control over its contents. See Associates and Aldrich Co. v. Times Mirror Co. 440 F.2d 133 (9th Cir. 1971); Approved Personnel, Inc. v. Tribune Co., Fla., App., 177 S.2d 704, 706 (1965)." 347 F. Supp. at 333.

Similarly, in the instant case, N.Y. Telco has not rejected plaintiff's advertisement in toto--it remains willing to run the advertisement in its Yellow Pages if the objectionable portion of the advertisement is deleted.

The court in America's Best also approved as not anti-competitive the two purposes behind the movie advertisement policy: 1) the newspapers' concern about their

image and 2) the burden of policing such advertisements for objectionable material. America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., supra at 333. Those policies are also present in the instant case. N.Y. Telco has a very real concern that the public views it as associated with the advertisements run in the Yellow Pages (76A) and as such is entitled to avoid advertising practices it deems questionable.* Dollar A Day Rent A Car Systems, Inc. v. Mountain States Tel. & Tel. Co., 22 Ariz. App. 270, 526 P.2d 1068 (Ct. App. 1974) (upholding telephone company's right to refuse advertising mentioning price). As then Justice Breitel stated in Abco Moving & Storage Corp. v. New York Telephone Co., 199 Misc. 309, 311, 106 N.Y.S.2d 90, 92 (Sup. Ct. N.Y. Cy. 1951):

"Defendant [N.Y. Telco] has an ethical obligation to protect the advertising pages of its classified directory from being the instrument of unethical practice upon the public. In the absence of machinery for testing grounds for approval and rejection of advertisements outside the defendant company, its action in rejecting advertisements should be liberally construed."

See also Videon Corp. v. Burton, 369 S.W.2d 264, 271 (Kansas City Ct. App. 1963).

* The publication of advertisements in the Yellow Pages is not regulated by the New York Public Service Commission. Frank v. New York Telephone Co., 34 Misc. 2d 395, 228 N.Y.S.2d 536 (Sup. Ct. Erie Cy. 1962).

In a number of other cases allegedly involving conspiracies in violation of federal antitrust laws, courts have upheld the right of advertising media or other persons to control the content of advertising. American Federation of Television and Radio Artists v. National Association of Broadcasters, 5 CCH Trade Reg. Repr. ¶60,687 (S.D.N.Y. 1976) (refusal to permit children's television show hosts to deliver commercial messages); Tropic Film Corp. v. Paramount Pictures Corp., supra (refusal to accept advertising for "X" rated films); American Brands, Inc. v. National Association of Broadcasters, 308 F. Supp. 1166 (D.D.C. 1969) (refusal to accept certain cigarette advertising); Hughes Tool Co. v. Motion Picture Association, 66 F. Supp. 1006 (S.D.N.Y. 1946) (refusal to approve photographs for use in advertising a motion picture). In each of the above-cited cases, the regulation of advertising content was undertaken by an association of competitors. The instant situation--where the alleged conspirators do not compete--presents an even stronger case for permitting such regulation.

In other contexts, the right of a publisher to exclude such advertising has been almost universally recognized. See Annot., Right of Publisher of Newspaper or Magazine, in Absence of Contractual Obligation, to Refuse Publication of Advertisement, 18 A.L.R.3d 1286

(1968). Numerous cases have recognized a telephone company's right to regulate the content of its Yellow Pages. E.g., Dollar A Day Rent A Car Systems, Inc. v. Mountain States Tel. & Tel. Co., supra; Marino v. New York Telephone Co., N.Y.L.J., Oct. 22, 1975 at p. 6, col. 5 (Sup. Ct. N.Y. Cy.); Frank v. New York Telephone, supra; Abco Moving & Storage Corp. v. New York Telephone Co., supra; Abco Moving & Storage Corp. v. New York Telephone Co., 193 Misc. 96, 83 N.Y.S.2d 448 (Sup. Ct. N.Y. Cy.), aff'd mem., 274 App. Div. 779, 81 N.Y.S.2d 146 (1st Dep't), appeal dismissed, 298 N.Y. 637 (1948); cf. A...A, Inc. v. Southwestern Bell Telephone Co., 373 P.2d 31 (Okla. Sup. Ct. 1962).

The second policy mentioned in the America's Best case--the difficulty of policing such advertisements--is also applicable here, particularly in light of the important public policy considerations announced by Congress. In Camp-of-the-Pines, Inc. v. New York Times Co., 184 Misc. 389, 53 N.Y.S.2d 475 (Sup. Ct. Albany Cy. 1945), plaintiff sought to place an advertisement in the defendant newspaper for its holiday camp. It wished to advertise the camp as catering to "selected clientele" but the newspaper rejected the advertisement on the grounds that it was possibly in violation of New York's Civil Rights Law. The court upheld the refusal to run the advertisement:

"Defendant was under no obligation to guess at its peril whether the words 'selected clientele' did or did not violate the provisions of Section 40 of the Civil Rights Law." 184 Misc. at 399, 53 N.Y.S.2d at 485.

Similarly, N.Y. Telco should not be required to guess whether advertisements for debugging services are attempts to evade either the letter or spirit of the federal law prohibiting the advertisement of surveillance devices.

In sum, we submit that N.Y. Telco's policy respecting debugging advertisements does not constitute an unreasonable restraint in violation of Section 1 of the Sherman Act. There is not the slightest indication of any anti-competitive purpose in the evolution of the policy, and it is clear beyond question that it resulted from a bona fide concern to protect the public from electronic surveillance.

3. There was no restraint of interstate trade.

Section 1 of the Sherman Act, upon which the court below based its grant of a preliminary injunction, provides in relevant part:

"Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal. . . ." 15 U.S.C. § 1. (Emphasis added).

Conduct restrains trade "among the several States" only if the acts complained of occur within the flow of interstate commerce or substantially affect interstate commerce.

Las Vegas Merchant Plumbers' Association v. United States, 210 F.2d 732, 739-740 n.3 (9th Cir.), cert. denied, 348 U.S. 817 (1954). Under either test, the transactions complained of must affect or have an effect on interstate commerce. Id. A court cannot presume such effects. See United States v. Yellow Cab Co., supra at 230-33. To support jurisdiction, the involvement with interstate commerce "must be direct and substantial, and not merely inconsequential, remote or fortuitous." Page v. Work, 290 F.2d 323, 332 (9th Cir.), cert. denied, 368 U.S. 875 (1961).

In determining whether an activity has the requisite direct and substantial effect upon interstate commerce, courts have inquired as to whether the activity is essentially local in nature. United States v. Yellow Cab Co., supra at 231; Wickard v. Filburn, 317 U.S. 111, 124 (1942). Many services have been held to be essentially local and thus outside the scope of the federal antitrust laws.*

* E.g., barbering, Hotel Phillips Inc. v. Journeymen Barbers, 195 F. Supp. 664 (W.D. Mo. 1961), aff'd, 301 F.2d 443 (8th Cir. 1962); property management, Marston v. Ann Arbor Property Managers (Management) Association, 422 F.2d 836 (6th Cir.), cert. denied, 399 U.S. 929 (1970); medical practice, Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958); hospitals, Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167 (8th Cir.), cert. denied, 361 U.S. 884 (1959), ice and cold storage facilities, Atlantic Co. v. Citizens Ice and Cold Storage, 178 F.2d 453 (5th Cir. 1949), cert.

The complaint in the instant case lacks the requisite jurisdictional allegation, and the record below demonstrates that the alleged restraint has no effect whatsoever on interstate commerce. The only jurisdictional allegation contained in the complaint is that "telephone service and telephone directories are clearly disseminated in such inter-state commerce" (12A). Even if such an allegation were true,* it is irrelevant in the instant case where the trade or commerce purportedly restrained is the provision of debugging services, specifically in Queens County and generally in New York City and Nassau, Suffolk and

(Footnote continued)

denied, 339 U.S. 953 (1950); cemetery operations, Lawson v. Woodmere Inc., 217 F.2d 148 (4th Cir. 1954), garbage collection, Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); mortuary services, John Kalen Funeral Home, Inc. v. Fultz, 313 F. Supp. 453 (W.D. Wash. 1970), aff'd per curiam, 442 F.2d 1342 (9th Cir.), cert. denied, 404 U.S. 881 (1971); bowling alley operation, Liebenthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); taxi service to and from railroad stations, United States v. Yellow Cab Co., supra; publication of legal advertising, Page v. Work, supra; and publication of Yellow Page advertising, Best Advertising Corp. v. Illinois Bell Telephone Co., 339 F.2d 1009 (7th Cir. 1965).

* In Best Advertising Corp. v. Illinois Bell Telephone Co., supra, the court affirmed the dismissal of a complaint on the grounds of failure to state a claim for relief where plaintiff alleged that defendants AT&T and Donnelly conspired to refuse to deal with plaintiff who sought to represent prospective advertisers in the Yellow Pages for two areas in Illinois. The court stated that the alleged refusal to deal "has not substantially affected interstate commerce". Id. at 1012.

Westchester Counties. See Uniform Oil Co. v. Phillips Petroleum Co., 400 F.2d 267 (9th Cir. 1968); Liebenthal v. North Country Lanes, Inc., supra.

The activity which is the subject of this litigation is essentially local in nature. Plaintiff is licensed pursuant to N.Y. Gen. Bus. Law § 70 to offer its services as a private investigative agency in New York State, and is only seeking to advertise its services respecting debugging in New York State. (214A). Owing to New York State licensing requirements, it is reasonable to assume that a person in New York desiring such services will contact a licensee within the state. Thus, any competition in the provision of debugging services is of an intrastate character. Accordingly, since plaintiff does not compete in interstate commerce, it cannot recover under the Sherman Act. Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951).

Even if plaintiff had made a sufficient jurisdictional allegation and even if it were not clear that the trade allegedly restrained is essentially local in nature, the court below erred because it conducted no inquiry and hence made no finding as to whether jurisdiction existed. In a case arising under section 1 of the Sherman Act,

jurisdiction turns "on the circumstances presented in each case and require[s] a particularized judicial determination." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 n.12 (1974). There were no facts below on which the court could have found that the alleged restraint affected trade or commerce among the several states and the court below made no such determination.

C. The balance of hardship does not tip decidedly toward plaintiff.

The court below found that the balance of hardship tipped decidedly in favor of plaintiff because 1) the harm alleged to result from the exclusion of the debugging portion of their advertisement "will be quite difficult to compute in terms of money damages" (311A), 2) the cost of alternative sources of advertising would be prohibitive and 3) the placing of one debugging advertisement would not harm defendant.

In terms of plaintiff's interest, it is simply incorrect that plaintiff's damages are so difficult to compute as to militate in favor of the grant of a preliminary injunction. See 280A-282A for plaintiff's estimate of its anticipated debugging revenues. In Tropic Film Corp. v. Paramount Pictures Corp., supra, plaintiff sought a preliminary injunction to prohibit the placing of an "X" rating on its motion picture on the grounds that it would suffer irreparable injury caused by lost revenues. In rejecting

the contention, the court noted:

"Even if one assumes, arguendo (and it is by no means demonstrated), that the plaintiff's claims of lost revenues are correct, no showing has been made that plaintiff's damages cannot be fully and promptly remedied by the granting of a money judgment against the defendants. Indeed, no attempt at such a showing has been made by the plaintiff, and it is reasonable to assume that its failure to do so is evidence of the financial strength of defendants and their ability to pay whatever damage judgment might be granted in this case. Whatever harm plaintiff may be shown to have suffered, then, is clearly reparable. That fact alone is sufficient ground for the denial of a preliminary injunction." Supra at 1255.

American Brands, Inc. v. National Association of Broadcasters, supra at 1169.

With regard to alternative sources of advertising, plaintiff has made no showing in the first instance that its inability to advertise its debugging services in the Yellow Pages will prevent persons who use the Yellow Pages from seeking such services from plaintiff. Plaintiff does not assert that other private investigative agencies fail to obtain such business from persons utilizing the Yellow Pages although such agencies' advertisements follow the advertising standards promulgated by N.Y. Telco. Plaintiff merely suggests that in order to obtain the coverage afforded by the Yellow Pages it would have to spend more money. Plaintiff makes no attempt to describe the nature of the market for debugging it is

attempting to reach and it is thus hardly surprising that plaintiff is unable to give a realistic estimate of the costs of reaching that market through alternative means.

It is reasonable to assume that, if such a market exists, it is a relatively narrow one and that there are economically feasible alternative methods of advertising for reaching that market short of plaintiff's incredible estimates. See Robinson Insurance & Real Estate Inc. v. Southwestern Bell Telephone Co., 366 F. Supp. 307, 310 (W.D. Ark. 1973); Gas House, Inc. v. Southern Bell Tel. & Tel. Co., 221 S.E. 2d 499, 505 (N.C. Sup. Ct. 1976); Smith v. Southern Bell Tel. & Tel. Co., 364 S.W.2d 952, 958 (Tenn. Ct. App. 1962); cf. Classified Directory Subscribers Association v. Public Service Commission, 383 F.2d 510, 513 (D.C. Cir. 1967).

Finally, it should be noted that plaintiff estimated its annual debugging revenue to be approximately \$30,000. (281A). There is no suggestion that the defendants would be unable to answer in damages for any amount of lost profits due to the no-debugging advertisement policy, should it ultimately be determined that defendants are liable to plaintiff. Nor is this a case in which plaintiff's business will be destroyed if it is not granted preliminary relief. Plaintiff will be in the same position as all other private investigative agencies in New

York City pending a decision on the merits.

Plaintiff remains free to advertise its other services in the Yellow Pages, to advertise its debugging services in whichever other media it chooses and to engage in debugging and other services. At most, plaintiff will be required to forego for one year that portion of debugging business which would have come through advertisement of that service in the Yellow Pages and which plaintiff could obtain by no other economically feasible means.

As against this minimal harm to plaintiff, N.Y. Telco will be required to change its long-standing policy with regard to such advertising. Although it is tempting to argue--as the court did below--that one such advertisement would inflict little damage, it must be borne in mind that N.Y. Telco, as publisher of the Yellow Pages, will be viewed by the public as to some degree responsible for its content. Abco Moving & Storage Corp. v. New York Telephone Co., 199 Misc. 309, 311, 106 N.Y.S.2d 90, 92 (Sup. Ct. N.Y. Co. 1951).

The most significant interest in the balancing of hardships is the public interest as reflected in the Congressional proscription of the advertising of any

device "where such advertisement promotes the use of such devices for the purpose of surreptitious interception of wire or oral communications". 18 U.S.C. §2512(1)(c)(ii). The public interest is entitled to considerable weight in determining whether to grant a preliminary injunction. As the Supreme Court stated in Yakus v. United States, 321 U.S. 414, 440-41 (1944):

"[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff This is but another application of the principle declared in Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552 that 'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" (Citations and footnote omitted).

United States v. New Haven, 447 F.2d 972 (2d Cir. 1971); Tropic Film Corp. v. Paramount Pictures Corp., supra at 1255-56.

Consideration of the interest of others who offer such services but who have accepted N.Y. Telco's advertising policy also militates against the grant of a preliminary injunction. The effect of the preliminary injunction is to make plaintiff's advertisement the only one in the Queens Yellow Pages, indeed in New York City, offering debugging

services. It would be inequitable to grant plaintiff such an advantage over its competitors at this preliminary stage.

CONCLUSION

We respectfully request that the order of the District Court, entered on February 25, 1976 and modified on February 26, 1976 granting plaintiff's motion for a preliminary injunction, be reversed.

Dated: New York, New York
March 24, 1976

Respectfully submitted,

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